No. 83-1387

IN THE

Supreme Court of the United States

October Term, 1983

LEONA M. HOLT,
Plaintiff-Appellant,

v.

COUNTY OF TIOGA, NEW YORK,
Defendant-Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF NEW YORK

MOTION TO DISMISS

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The appellee moves this Court to dismiss the appeal herein for want of a substantial federal question.

I.

Statute involved and the nature of the case.

A. The statute.

This appeal raises the question of the validity of Tioga County Local Law No. 2 of 1978, which took effect July 10, 1978.

The Local Law states in part:

> (a) No civil action shall be maintained against the County of Tioga or the County Superintendent of Highways for damages or injuries to persons or property sustained by reason of any highway, bridge or culvert being defective, out of repair, unsafe, dangerous or obstructed unless written notice of such defective, unsafe, dangerous or obstructive condition of such highway, bridge or culvert was actually given to the County Clerk or County Superintendent of Highways, and that there was a failure or neglect within a reasonable time after the giving of such notice to repair or remove the defect, danger or obstruction complained of, or the place made reasonably safe.

The law further provides that the County Clerk and the County Superintendent of Highways shall keep a record of all notices which they receive concerning the existence of such defective, unsafe, dangerous or obstructive conditions, setting forth the date of receipt of such notice and the nature and location of the conditions stated to exist in the name of the person and address of the person from whom the notice is received.

B. The proceedings below.

The appellee is a rural county in upstate New York with 145 miles of county highways to maintain.

On November 19, 1978, the appellant was involved in a one car motor vehicle accident in which the vehicle which she was driving went out of control and hit a tree located outside of the county road right of way known as West Creek Road.

Examination of the appellee's records reveal that there were no prior written notices of the condition which appellant alleged caused her vehicle to go out of control.

Appellant's pleadings did not allege compliance with Local Law No. 2 and appellee's answer set forth the affirmative defense of lack of compliance with Local Law No. 2.

After extensive pretrial discovery by the appellant, the appellee moved to dismiss the action because of the appellant's failure to plead compliance with the Local Law. Compliance with the Local Law could have been effected if anyone had given written notice of the alleged condition to appellee prior to the accident. The New York Supreme Court at Special Term, by an Order entered December 4, 1980, denied appellee's motion. Appellee took an appeal to the Appellate Division of the Supreme Court of the State of New York, Third Department, which found Local Law No. 2 of 1978 unconstitutional as inconsistent with the general law of the state (82 A.D.2d 991). Upon application the Appellate Division, Third Department, certified a single question to the New York Court of Appeals for determination:

> Is the determination of the Appellate Division that Local Law No. 2 of 1978 of the County of Tioga is unconstitutional correct?

The New York Court of Appeals, by a decision dated June 15, 1982, held that the Local Law No. 2 was not inconsistent with either Section 139 of the Highway Law nor Section 50-e of the General Municipal Law of the State of New York and that the County of Tioga had a constitutionally delegated power to enact a prior notification statute.

In Supreme Court, Special Term, appellee subsequently moved for summary judgment on the grounds that there had been no prior written notice, given to appellee of the alleged defect in compliance with the Local Law. On October 7, 1982, Special Term granted appellee's motion. Appellant appealed to the Appellate Division, Third Department of the Supreme Court of the State of New York, which affirmed the judgment of Special Term and found Local Law No. 2 to be constitutional under federal law.[1]

Appellant appealed to the Court of Appeals of the State of New York, and on September 27, 1983 the Court of Appeals dismissed the appeal on the grounds that "no substantial constitutional question is directly involved." Appellant further moved for leave to appeal to the Court of Appeals on non-constitutional grounds, which motion was denied on November 29, 1983.

II.

ARGUMENT.

This case presents no substantial federal or constitutional question.

It is settled that not every allegation of a federal question will suffice to give jurisdiction: "There must be a real, substantive question on which the case may be made to turn," that is, "a real and not a merely formal federal question is essential to the jurisdiction of this court."

[1]The constitutional arguments concerning Equal Protection and Due Process under the United States Constitution advanced herein by appellant were briefed and argued to the New York Supreme Court, Appellate Division, Third Department, and New York Court of Appeals during both the earlier and subsequent appeals.

Equitable Life Assurance Society v. Brown, 187 U.S. 308, 311, 23 S. Ct. 123, 47 L.Ed. 190 (1902), *citing New Orleans Water Works Company v. Louisiana* (1902), 185 U.S. 336, 345, 22 S. Ct. 691, 46 L.Ed. 936.

Plaintiff's sole constitutional argument is that Tioga County Local Law No. 2 of 1978 violates her guarantees of due process and equal protection under the 14th Amendment of the United States Constitution.

A. There is no constitutional or Common Law right to sue the sovereign.

Appellant's entire jurisdictional statement rests upon the single contention that there is a "vested" right to sue the sovereign (in this case, Tioga County). There is no constitutional right to sue the sovereign:

> The United States as sovereign is immune from suit unless it has consented to be sued, *United States v. Sherwood*, 312 U.S. 584, 61 S. Ct. 767, 85 L.Ed. 408 (1941). A corollary to this doctrine of governmental immunity is that, when the United States consents to be sued, Congress may define the conditions under which suits will be permitted. *Kendall v. United States*, 107 U.S. 123, 125, 2 S. Ct. 277, 27 L.Ed. 437 (1882).

Garrett v. United States, 640 F.2d 24 (6th Cir. 1981). In *Payne v. Panama Canal Co.*, 607 F.2d 155 (5th Cir. 1979), the court stated:

> Congress may limit such a waiver by imposing conditions and restrictions it deems necessary. *Crown Coat Front Co. v. United States*, 386 U.S. 503, 520, 87 S. Ct. 1177, 18 L.Ed. 2d 256 (1967); *Honda v. Clerk*, 386 U.S. 484, 501, 87 S. Ct. 1188,

18 L.Ed.2d 244 (1967); *Hart v. United States*, 585 F.2d 1280 (5th Cir. 1978), *cert. denied* ____ U.S. ____, 99 S. Ct. 2882, 61 L.Ed. 2d 310 (1979); *Ducharme v. Merrill National Laboratories*, 574 F.2d 1307, 1311 (5th Cir. 1978), *cert. denied*, 439 U.S. 1002, 99 S. Ct. 612, 58 L.Ed. 2d 677 (1979). See also *Tsakos Shipping and Trading S.A. v. M/T "Taboga,"* 597 F.2d 66 (5th Cir. 1979).

607 F.2d at 163. See also: *Franquez v. U.S.*, 604 F.2d 1239 (9th Cir. 1979); *Stubbs v. U.S.*, 620 F.2d 775 (10th Cir. 1980); *Bor-Son Building Corp. v. Heller*, 572 F.2d 174 (8th Cir. 1978).

The Court of Appeals of the State of New York addressed this point at length in rejecting due process and equal protection challenges to a state statute placing limitations and restrictions on those seeking to sue the sovereign:

> The right, then, of citizens to bring suit against a municipal corporation for alleged negligence in the performance of a governmental function, *did not exist at common law*. Furthermore it was not in the past, nor is it at present, guaranteed by constitution provision. The present rule, that the state and its municipal adjuncts are liable in negligence in the same manner as individuals or corporations, is statutory in origin. (Court of Claims Section 8; *Bernadine v. City of New York*, 294 N.Y. 361.) Manifestly, then, any such right granted is one which might have been withheld altogether by the Legislature. Accordingly, the right to bring suit against a municipality may be granted upon such conditions as the Legislature, in its wisdom, sees fit to impose. (*Winter v. City of Niagara Falls*, 190 N.Y. 198; *MacMullen v. City of Middletown*, 187

> N.Y. 37; *City of Birmingham v. Weston*, 233 Ala. 563; *Miramar Co. v. City of Santa Barbara*, 122 P.2d 643 [Cal.]; *Baker v. Town of Manitou, Colo.*, 277 F. 232 [C.A. 8th]; *Sherfey v. City of Brazil*, 213 Ind. 493; *Palmer v. City of Cedar Rapids*, 165 Iowa 595; *Dechant v. City of Hays*, 112 Kan. 729; *Galloway v. City of Winchester*, 299 Ky. 87; *Madden v. City of Springfield*, 131 Mass. 441; *Davidson v. City of Muskegon*, 111 Mich. 454; *Szroka v. Northwestern Bell Tel. Co.*, 171 Minn. 57; *Schmidt v. City of Fremont*, 70 Neb. 577; *Robinson v. City of Memphis*, 171 Tenn. 471; *Hurley v. Town of Bingham*, 63 Utah 589.)

Matter of Brown v. Trustees of Hamptonburg School District, 303 N.Y. 484, 489 (1952). See also *Pausley v. Chaloner*, 54 A.D.2d 131 (3rd Dep't 1976).

Inasmuch as a government imposes conditions or restrictions on the right to bring suit against it, such conditions or restrictions cannot violate due process and equal protection guarantees because there is no constitutional entitlement, *per se*, to sue the sovereign.

It is thus submitted that the decision of the Appellate Division below (*Holt v. Tioga County*, 95 A.D.2d 934, 935 [3rd Dep't 1983]) was correct in asserting that:

> The right to sue a subdivision of the State for negligence in the performance of a governmental function is founded upon statute and the legislative authority involved may properly limit such right as it sees fit. * * * Since Local Law No. 2, which was in effect at the time of the accident, defined a right to sue only if prior written notice had been given to the county, the absence of such notice means that plaintiff never possessed a vested right to bring an action.

B. There is a rational basis for this law.

Where a fundamental right or a suspect classification is involved, a statute or other government action must be subject to strict judicial scrutiny in order to meet due process and equal protection requirements: *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 17 (1973). Such fundamental rights embrace interstate travel, privacy, voting and all first amendment rights. No such right is asserted here, nor does the appellant allege that she is within a suspect classification.

In all other cases, a governmental act or statute does not violate due process or equal protection if it rationally relates to any possible legitimate end of government: *Massachusetts Board of Retirement v. Mergio*, 427 U.S. 307 (1976); *San Antonio Independent School District v. Rodriguez, supra*; *Reed v. Reed*, 404 U.S. 71 (1971). The traditional analysis thus required is that a legislative classification shall be sustained unless it is patently arbitrary and bears no rational relationship to a legitimate government interest. Where this test is used, it is irrelevant whether the supposed justification is compelling or merely legitimate. Convenience or efficiency will suffice and the action or statute need not "closely fit" the justification or basis for the law: *Vance v. Bradley*, 440 U.S. 93 (1979). The act is presumed valid and the burden is on the challenging party to prove its invalidity. Further, this Court has held that it will not substitute its judgment for that of the Legislature: *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 124 (1978).

The Appellate Division of the Supreme Court of the State of New York below found there was a rational basis for Local Law No. 2 in *Holt v. Tioga County*, 95 A.D.2d 934 (3rd Dep't 1983) at 935:

> The statute possesses a rational basis in that it enables the county to protect the travelling public (*Martin v. City of Cohoes*, 37 N.Y.2d 162, 166); for these reasons we find no denial of due process.

A second rational basis for this law is to limit the liability of the taxpaying public to defective conditions of which the County is aware of and which it had sufficient time to correct.

C. Many other states have enacted prior written notice statutes pursuant to waiver of sovereign immunity.

Contrary to the contention of appellant at page 8 of her brief, that "Outside of New York State there are no cities, towns or states which have prior written notice of defect laws," governmental units in the following states have enacted prior written notice of defect statutes or laws: Maryland, Michigan, Minnesota, Nebraska, Oregon, Rhode Island and Wyoming.[2]

In addition, prior actual notice statutes are in effect in Kansas, Maine and Montana.[3]

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[2]Md.—See Code Pub. Loc. Laws 1930, art 1A §89.

Mich.—Comp. Laws 1948 and C.L.S. 1961, §242.8. See now Rev. Judicature Act §691-1403, s.3.

Minn.—See, for example, Charter of City of Waseca, enacted pursuant to G. L. 1903, ch. 238, p. 349. See now Minn. Stat. Ann. §465-121.

Ore.—See, for example, Ch. X §14, 1940, Charter of City of Independence.

Neb.—Neb. Rev. Stat. RRS §14-802, rep. by Law 1969 c.138, §28.

Rhode Island—G. L. 1923, Ch. 96, §13.

Wyoming—Wyo. Stat. 1957, §15-28.

[3]Kan.—G.S. 1935 §68-301.

Maine—Rev. Stat. Ann., tit. 23 §3655.

Montana—Mont. Rev. Cent. Code RCM 1947 §11-1305.

Moreover, the courts have consistently upheld both prior written notice and prior actual notice statutes in many states[4]:

Schigley v. Waseca, 106 Minn. 94 (1908); *Abbott v. City of Rockland*, 105 Me. 147 (1909); *Thorbjohnson v. Rockland-Rockpower Lime Co.*, 275 A.2d 588 (Me. 1971); *Pomeroy v. City of Independence*, 209 Ore. 213 (1957); *Noonan v. City of Portland*, 161 Ore. 213 (1938); *Kulish v. Cray*, 52 R.I. 212 (1932); *Engle v. Mayor and City Council of Cumberland*, 180 Md. 465 (1942); *Stewart v. Lincoln*, 114 Neb. 84 (1925); *Updike v. City of Omaha*, 87 Neb. 228 (1910); *Stockton Automobile Co. v. Confer*, 154 Cal. 902 (1908); *Backstrom v. Ogallah Turnpike*, 149 Kan. 553 (1939); *Williams v. Kansas State Highway Commission*, 134 Kan. 810 (1932); *McGuire v. Board of Commissioners of Ellis County*, 133 Kan. 225 (1931); *Arnold v. Board of Commissioners of Coffey County*, 131 Kan. 343 (1930); *Ratliff v. City of Great Falls*, 132 Mon. 89 (1957); *Andrews v. City of Butte*, 116 Mon. 69 (1944); *Forsyth v. Saginaw City*, 158 Mich. 201 (1909); *Boike v. Flint*, 374 Mich. 462, 132 N.W. 2d 658 (1965); *Kowalczyk v. Bailey*, 1 Mich. App. 55 (1965).

[4]It is important to note that the cases of which appellant principally relies, *O'Neil v. City of Parkensburg*, 237 S.E.2d 504 (W. Va. 1977); *Grubaugh v. City of St. Johns*, 180 N.W.2d 778 (Mich. 1970); *Barry v. Village of Port Jervis*, 64 App. Div. 268 (2d Dep't 1901), all involve notice of claim provisions, not prior notice of defect statutes.

Conclusion.

For all of the above reasons the instant appeal should be dismissed.

Respectfully submitted,

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